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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 55

JOHN P. CLOUGHERTY, in behalf of himself and other present and former employees, similarly situated, of the defendant corporation,
Petitioner,
vs.
JAMES VERNOR COMPANY,
a Michigan corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOHN P. CLOUGHERTY, in behalf of himself and other present and former employees, similarily situated, of the defendant corporation,
Petitioners,
vs.
JAMES VERNOR COMPANY,
a Michigan corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John P. Clougherty, in behalf of himself and other employees, similarly situated, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in this case on February 19, 1951. Review is sought of that part of the judgment pertinent to the questions hereafter presented.

OPINION BELOW

The opinion of the District Court (R. 157-168) is reported at 74 F. Supp. 364. The opinion of the Court of Appeals (R. 182-190) is reported at 187 F. 2d. 288.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1951. The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), United States Code pursuant to the Judicial Code, Act of June 25, 1948 (Ch. 646, 62 Stat. 928, Sec. 1).

QUESTIONS PRESENTED

1. Where used, empty bottles belonging to and bearing the label of a ginger ale manufacturer doing business throughout Michigan and in interstate commerce, are collected and transported by employees of the manufacturer from points within the state to the plant of the manufacturer in the state, to be used by the manufacturer for the production of ginger ale and as containers for its interstate and intrastate distribution, are such employees who perform the labor of collecting and transporting such bottles engaged in the production of "goods for commerce" or in "any process or occupation necessary to the production thereof" within the meaning of the Fair Labor Standards Act of 1938?

2. Whether bottles used by a manufacturer in the manufacture and distribution of ginger ale are "goods" within the meaning of the Fair Labor Standards Act of 1938.

3. Whether a judgment for unpaid overtime compensation under the Act should include interest from the date of the accrual of the claim when no liquidated damages are awarded.

STATUTE INVOLVED

The statute involved is the "Fair Labor Standards Act of 1938" as amended, 52 Stat. 1060, 29 U. S. C. 201 ff. The pertinent portions of the statute involved are:

> "Sec. 3 (i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."
>
> Sec. 3 (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act (Secs. 201 to 219 of this title) an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Involved also may be Section 3 (j) of the Fair Labor Standards Amendments of 1949:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, han-

> dling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

although Section 16 (d) of the Amendments of 1949 provides:

> "No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act."

Also involved is Section 16 (b) of the "Fair Labor Standards Act":

> "Any employer who violates the provisions of Sec. 6 or Sec. 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation as the case may be and in an additional equal amount as liquidated damages."

amended by Section 11 of the "Portal-to-Portal Act of 1947", Title 29, U. S. C. 260:

> "In any action commenced prior to or on or after the date of the enactment of this Act (May 14, 1947) to recover minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act of 1938 as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may in its sound discretion award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16 (b) of such Act."

STATEMENT

1. This is an action for overtime compensation, brought under Section 216 (b) of the Fair Labor Standards Act of 1938, 29 U. S. C. 216 (b). It is conceded that the employees involved have worked more hours than specified in Section 7 of the Act, Title 29, U. S. C. 207, and have not received statutory compensation (R. 182).

2. The period involved in these proceedings covers March 23, 1939 to December 31, 1944.

3. The respondent manufactures gingerale at its plant in Detroit (R. 15, 105). It distributes its product, principally as bottle goods, in interstate commerce through its branches located at Toledo, Cincinnati, Akron, Dayton, Cleveland, and Columbus, Ohio, Buffalo, New York, and Erie Pennsylvania (R. 126). Interstate distribution amounts to some 14% to 20% of the respondent's business (R. 153, 184). It distributes its product, principally as bottle goods, in intrastate commerce through approximately 6,000 to 8,000 wholesale outlets in Detroit (R. 106) and through its branches in Port Huron, Lansing, Saginaw, Jackson, Ann Arbor, and Monroe, Michigan (R. 24).

4. The respondent distributes hundreds of millions of bottles of its product yearly (R. 135). Each bottle bears the label of the respondent company. Since 1941 the label has been embossed or integrated into the bottle (R. 40, 41, 42).

5. The respondent owns the bottles in which the ginger ale is manufactured and distributed (R. 31, 32, 43, 120). To insure the return of the empty bottles for continued use by the respondent, a monetary deposit is charged (R. 36, 113).

6. The petitioners make deliveries of filled bottles in the city of Detroit and in the state of Michigan (R. 25, 122). The petitioners pick up empty bottles at the time delivery of filled bottles is made at each stop (R. 31, 36, 38, 39, 45, 47, 53). Empty bottles so picked up by the petitioners are transported back to the plant of the respondent company by truck (R. 27, 57). The number of empty bottles picked up by the petitioners corresponds substantially with the number of filled bottles delivered (R. 36). About 3% of the bottles are lost or destroyed in the course of delivery and return (R. 117, 121). New bottles are employed to make up for the loss and to take care of increased consumer demand (R. 117). New and used bottles are handled alike in processing (R. 120).

7. On returning to the plant with the empty bottles, the body of the truck driven by the petitioners is lifted from the chassis by a crane and swung into the plant and deposited on a dolly manned by other employees of the respondent (R. 28, 185). The bottles so returned from points within the state of Michigan are intermingled with bottles returned from points outside the state of Michigan (R. 28). The intermingling of bottles used for interstate and intrastate commerce is conceded (R. 49, 50, 185). The empty bottles so returned and so intermingled are placed in the stockroom and from there withdrawn to be put into readiness for process and manufacture. They are taken by conveyor to the bottling department where they are washed, then to the syruper where the syrup is put into the bottles, then to the filler machine where carbonated water is added to the syrup, then to the crowning or capping machine, and then to the spinner. The spinner mixes or agitates the contents or ingredients in the bottle to make sure that the contents or ingredients are thoroughly mixed and distributed throughout the bottle (R. 30, 31, 32, 120,

184). After the bottles are filled and mixed, they are placed in cases and conveyed to the shipping room for delivery to the respective outlets of the company in Michigan and in other states (R. 33, 34, 133).

8. The District Court found that certain of the petitioners who participated in the delivery of ginger ale from the respondent's plant to the docks of vessels that ply the Great Lakes were engaged in interstate commerce (R. 167). The Court of Appeals affirmed this finding (R. 189). The District Court awarded interest to such petitioners on their respective claims from the date of the rendition of its opinion (R. 170). Such petitioners claimed that they should have been awarded interest from the date of the accrual of their claims and presented such question on appeal to the Court of Appeals (R. 174). The Court of Appeals modified the allowance of interest from the date of the rendition of the opinion to allow interest only from the date of rendition of the judgment (R. 189, 190).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that bottles "necessary not merely to hold the product but actually to produce it" (R. 187) are not "goods" contemplated by the Act.

2. In holding that the bottles are not "goods" within the contemplation of the Act because the respondent neither makes nor sells the bottles.

3. In holding that the petitioners were not engaged in the "production of goods" or in "any process or occupation necessary to the production thereof" because their handling of the bottles preceded the process of manufacturing ginger ale.

4. In holding that "returning the empties to the plant for a use which is partially interstate" (R. 187) does not have such a close and immediate tie with the process of production so as to constitute an occupation necessary to the production of goods for commerce.

5. In not distinguishing the handling and transportaiton of the empty bottles to the plant preliminary to the manufacturing process of ginger ale, from the handling that accomplishes the interstate transit or movement in commerce itself.

6. In affirming the District Court on the first and second questions here presented.

7. In denying interest from the date of the accrual of their claims to the petitioners in whose favor a judgment was rendered by the District Court without liquidated damages.

REASONS FOR GRANTING THE WRIT

1. CONFLICT WITH APPLICABLE DECISIONS OF UNITED STATES SUPREME COURT. The decision of the Court of Appeals erases the final clause of Section 3 (j) of the Act of 1938 and renders meaningless the final clause of Section 3 (j) of the Amendments of 1949. Despite its findings that the empties are returned to the plant for a use which is partially interstate (R. 187) and that the bottles are necessary not merely to hold the product but to atcually produce it (R. 187), the Court of Appeals holds that the drivers are not covered by the Act because their handling and transporting of the empty bottles back to the plant preceded the process of producing ginger ale and is no part of the production of ginger ale. It further holds that petitioners are not covered by the Act because they did not participate in the physical process of making ginger ale.

These holdings are in conflict with pertinent decisions of the Supreme Court.

Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116;[1]

Roland Electric Co. v. Walling, 326 U. S. 657, 66 S. Ct. 413;

Martino v. Michigan Window Cleaning Co., 327 U. S. 173, 66 S. Ct. 379;

Borden Co. v. Borella, 325 U. S. 679, 65 S. Ct. 1223;

Warren-Bradshaw Co. v. Hall, 317 U. S. 88, 63 S. Ct. 125;

D. A. Schulte v. Gangi, 328 U. S. 108, 66 S. Ct. 925.

If the respondent did not have the empty bottles returned by its employees it would have been handicapped in its manufacture and distribution of ginger ale, especially during the war years covered by this action when there was a shortage of bottles (R. 127, 157). Indeed, there were periods of time when the respondent did not have a single case of new bottles in its inventory (R. 155). During these periods the respondent's manufacturing and distributive processes would have been paralyzed but for the activities of the petitioners. The activities of the petitioners were not only necessary but were also "closely related" and "directly essential to production."

---

[1] In *Kirschbaum v. Walling, supra,* the Supreme Court states at 316 U. S. 524: "Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not limit the scope of the statute to the preceding clause which deals with employees 'in any other manner working on such goods.'"

2. The decision of the Court of Appeals erroneously extends the decision of the Supreme Court in *Western Union v. Lenroot,* 323 U. S. 490, 65 S. Ct. 335, to include the transportation of goods to the plant of the respondent prior to the completion of the manufacturing process in the category of "the handling or working on which accomplishes the interstate transit or movement in commerce itself."

3. The decision of the Court of Appeals has erroneously interpreted the statutory definition of "goods." The interpretation of the Court of Appeals limits the definition to goods made or sold by an employer. This was obviously not the legislative intent and is in apparent conflict with applicable decisions of the Supreme Court.

> *Martino v. Michigan Window Cleaning Co., supra; Roland Electric Co. v. Walling supra.*

In neither of these cases were the goods made or sold by the employer. In the case at bar, the collection, return, washing, and filling of the bottles were all steps that resulted in the ultimate product—a bottle of ginger ale.

4. IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT. In view of the Amendments of 1949 restricting the statutory definition of "produced" in Section 3 (j) of the Act from "any process or occupation necessary to the production thereof" to "closely related process or occupation directly essential to the production", the Court of Appeals has decided an important question of Federal law which should be settled by this Court. The petitioners believe that even under the more restricted test it seems plain that bringing bottles to a plant for use in the manufacture, production and distribution of bottled beverages is "closely related"

and "directly essential" to such production. If the decision of the Circuit Court of Appeals stands uncorrected, the scope of the Fair Labor Standards Act will be limited to the preceding clause in Section 3 (j) which deals with employees "in any other manner working on such goods." A closer relationship or tie between steps preparatory to manufacture or actual production and actual production itself than in the instant case is almost inconceivable. If such relationship is denied under the less limited definition of the Act prior to the Amendment of 1949, then pursuant to the amendment every activity that precedes the process of actual manufacture of the goods sold by the interstate shipper will be beyond the scope of the Act. Compare *Kirschbaum v. Walling,* 316 U. S. 517 at 525, 62 S. Ct. 1116 at 1121, where it is held that the employees (persons charged with the effective maintenance of a loft building, the tenants of which are principally engaged in the production of goods for interstate commerce) had such a close and immediate tie with the process of production for commerce and were such an essential part of it that the employees were engaged in an occupation necessary to the production of goods for commerce. Compare also *Roland Electric Co. v. Walling,* 326 U. S. 657, 66 S. Ct. 413.

5. The Court of Appeals held that the petitioners in whose favor a judgment was rendered without liquidated damages were not entitled to interest from the date of the accrual of their respective claims. Interest is allowed only from the date of the rendition of the judgment by the District Court. The decision is predicated upon the statement that the Fair Labor Standards Act makes no provision for interest, and upon the decision of this Court in *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697, 65 S. Ct. 895. It should be noted that in *Brooklyn Savings Bank v. O'Neil* the claimant was awarded statutory liquidated dam-

ages, and interest was disallowed solely on the grounds that the statutory liquidated damages served the same purpose as interest, and that to allow interest on liquidated damages would be to grant double compensation for damages. Inasmuch as the *Brooklyn Savings Bank* case was decided before Section 11 of the Portal-to-Portal Act of 1947 was enacted, the question of an employee's right to interest on a claim for unpaid compensation when he is disallowed liquidated damages is again unanswered by any decision of this Court.

6. CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL OF THE FOURTH AND FIFTH CIRCUITS. The statement by the Court of Appeals:

> "Here the purely intrastate delivery of filled and pick-up of empty bottles does not have such a close and immediate tie with the process of production as to enable the court to hold these drivers to be engaged in an occupation necessary to the production of goods for commerce * * * their activities constitute a separate local distribution * * *"

disregards the principal fact that the pick-up of the empty bottles and the delivery of such empties to the plant make available to a ginger ale manufacturer containers in which ginger ale is manufactured and then distributed in interstate commerce. This holding abnegates the legal effect of all activity preparatory to putting goods into readiness for interstate commerce which occurs prior to the manufacture of goods which are the subject of interstate commerce. This holding is in conflict with a related decision in the Fifth Circuit, *Enterprise Box Co. v. Fleming,* 125 F. 2d 897 (Cert. Den. 316 U. S. 704) where a manufacturer produced and sold boxes locally to a producer of cigars as

containers for cigars shipped in interstate commerce. Likewise the holding is in conflict with a decision of the Fourth Circuit, *Dize v. Maddrix,* 144 F. 2d 584, where the subject matter manufactured were boxes and barrels used as containers to hold seafood shipped in interstate commerce. It should be noted that neither the cigar nor the sea food required a container "actually to produce it" and further, the cigars at any rate could be shipped in interstate commerce without the container involved.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 30, 1951.

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CHARLES ELMORE CROPLEY

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 55

JOHN P. CLOUGHERTY, in behalf of himself and other present and former employees, similarily situated, of the defendant corporation,
Petitioners,
vs.
JAMES VERNOR COMPANY,
a Michigan corporation,
Respondent

RESPONDENT'S OBJECTIONS TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 730

JOHN P. CLOUGHERTY, in behalf of himself and other present and former employees, similarily situated, of the defendant corporation,
Petitioners,
vs.
JAMES VERNOR COMPANY,
a Michigan corporation,
Respondent

RESPONDENT'S OBJECTIONS TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James Vernor Company, respondent, objects to the Petition filed herein for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in this case on February 19, 1951.

Respondent will follow the outline used in the Petition in its objections to the Petition.

OPINION BELOW

This statement by petitioners is correct.

JURISDICTION

This statement by petitioners is correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(Respondent cannot accept the statement by petitioners)

1. Where a ginger ale manufacturer is engaged in distributing ginger ale intrastate, by city drivers in bottles to local retail outlets, and such city drivers pick up and bring back therefrom empty bottles which are stored in a common stock pile at the manufacturer's plant along with other empty bottles returned from company branches located in other states, are the city drivers who pick up and return (intrastate) such empty bottles from the local retail outlets to the manufacturer's plant engaged in "the production of goods for commerce" within the meaning of the Fair Labor Standards Act?

2. Where a ginger ale manufacturer is engaged in distributing intrastate by city drivers ginger ale in bottles to local retail outlets and such city drivers pick up and bring back therefrom empty bottles which are stored in a common stock pile at the manufacturer's plant with other empty bottles returned from company branches located in other states, are the empty bottles, picked up at the local retail outlets, "goods" within the meaning of the Fair Labor Standards Act?

3. Where a judgment is rendered by the District Court for overtime compensation under the Act, but no liquidated damages are awarded, should interest start from the date of the accrual of the claim or the date of the judgment of the District Court?

STATUTE INVOLVED

Section 3 (i) and 3 (j) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 ff are involved. Section 3 (j) of the Fair Labor Standards Amendments of 1949 does not govern inasmuch as the period for which recovery is sought is from March 23, 1939 to December 31, 1944.

COUNTER-STATEMENT OF FACTS

(Respondent admits paragraphs 1, 2, and 8 of Petitioner's "Statement" but cannot accept the other paragraphs thereof because they are wholly inadequate to a proper understanding of the case.)

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

Respondent adopts the statement of the Circuit Court (184-187) and the District Court (158, 159). For a more adequate counter-statement of facts, respondent submits the following:

A. The James Vernor Company, respondent, has its manufacturing plant at 239 Woodward Avenue, Detroit, Michigan, and is engaged in the manufacture and sale of a soft drink beverage called "Vernor's Ginger Ale" (105). The product is bottled in eight-ounce and twenty-four-ounce bottles, which are carried in cardboard cartons (25). Each carton contains two dozen eight-ounce bottles, or one dozen twenty-four-ounce bottles (25). A small amount of draft

ginger ale is also produced and carried in large cylindrical tanks (25).

B. A large stock pile of empty bottles is usually maintained at the company's manufacturing plant (33, 35, 117). Four rooms twenty feet wide and from eighty to ninety feet long are required to store the cases of empty bottles (119). The machine which puts ginger ale into the bottles does not run continually (121) and the empty bottles are stored for a matter of days, weeks or months, depending upon the need for production (119). Before starting the bottling machine, an adequate supply of empty bottles is requisitioned from the stock pile (33, 120). These empty bottles are then placed upon a conveyor which carries them from the bottle storage rooms on the upper floors down to the "soaker and rinser" where they are thoroughly cleaned, sterilized and rinsed (39-40, 120). From there the empty bottles proceed by conveyor to the syrup machine where extract and syrup are put in the bottles. From there the bottles go by conveyor to the filling machine where carbonated water is added in sufficient quantity. From there the bottles go by conveyor to the crowning machine where they are securely capped (120). Thereafter the bottles go to the "spinner" where the bottles are agitated as an added precaution so as to mix the extract and syrup with carbonated water (31). The bottles of ginger ale are then placed in cardboard cases, which proceed by conveyor to the stock room where the filled cases are placed in stock (33, 35, 120). The filled cases remain in stock until they are requisitioned for shipment by the shipping department (33, 120).

C. The company serves from 6,000 to 8,000 wholesale outlets in Detroit (106). It solicits and receives numerous orders from grocery stores, drug stores and other retail establishments in Detroit—mostly by telephone (106). In

filling such orders, a requisition is made by the shipping department upon the stock room, whereupon cases of ginger ale are placed on the conveyor and sent to the shipping room floor (33, 106). There, the cases are loaded on a truck body, which in turn is lifted by a crane and placed upon a truck chassis waiting outside on the street (24, 113). In this manner the city driver receives a load of cases containing bottles filled with ginger ale ready for him to deliver (24, 113). The city driver is given two copies of the orders for delivery of his load of ginger ale, arranged in the sequence in which he is to deliver the same, and proceeds to drive his truck and follow such orders (25). At each stop the city driver delivers one or more cases of ginger ale to the retail store (31). The number of cases of empty bottles picked up by the city driver corresponds substantially with the number of filled cases delivered by him (31, 36, 114). Upon his return to the plant with cases of empty bottles, the truck body with cases of empty bottles is then lifted from its chassis by the crane and brought inside the plant (24, 114); the returned empty bottles are then unloaded by shipping floor employees (28) and proceed by conveyor to the stock pile in the plant to be stored until further use is required of them (33).

D. The defendant company owns its own bottles (117); it purchases new bottles of both sizes from an out-of-state glass-bottle manufacturing company (117). Such new bottles are labelled with the company's trade-mark so that the label is non-removable (40, 126). About three (3%) per cent of the bottles put into use are lost, damaged, destroyed or not returned (117, 121). This loss is offset by the constant purchase of new bottles (121). Any increase in business also requires the adding of new bottles to the inventory (136, 137). The ownership of the cartons and bottles remains in the company and a small cash deposit equal

to the value of the bottle is required to induce the return of empty bottles (36, 113).

E. During the period in question (March 23, 1939 to December 31, 1944) the company manufactured its product exclusively at its plant in the city of Detroit (126). The company had eight branch warehouses in other cities in Michigan as well as eight branch warehouses in three other states to which the company shipped cases of ginger ale which were manufactured at Detroit (126).

F. During the period in question (1939 to 1944, incl.) the company shipped to its branch warehouses in other states from 14% to 20% of all bottled ginger ale produced by it (153). The balance—80% to 86%—was shipped in Michigan to its branch warehouses and also to drug stores, grocery stores and other retail stores and places of business in Detroit where it finally reached the ultimate consumer (126).

G. There is no segregation among empty bottles or filled cases in the company's stock piles between ginger ale for interstate and intrastate shipment (29, 49). Filled cases of ginger ale are requisitioned from the stock pile and shipped either outside or inside the state of Michigan as orders come for shipping (126).

H. In addition to city drivers there are city salesmen (who are "peddlers", each having his own customers) (47, 48, 159), and city salesmen's helpers (who assist the city salesmen in handling their loads) (47, 159). City salesmen's helpers are employed by the company and not by the driver-salesmen (48). Such helpers assist in delivering the cartons of ginger ale to the retail stores and assist in picking up cartons of empty bottles to return to the plant (47, 48, 111, 112). Such helpers sometimes assist in driving the driver-salesmen's trucks (45).

NO IMPORTANT QUESTION OF FEDERAL LAW IS INVOLVED IN THE PETITION

1. *The questions raised by petitioners have been virtually rendered moot since December 31, 1944, except for petitioners' claim for money recovery for the period prior thereto.*

The opinion of the Circuit Court states:

> "All of those in classifications 1, 2 and 3 since January 1, 1945, have been paid by defendant in accordance with the provisions of the Fair Labor Standards Act, being under a specific reservation that the defendant is not legally liable to make these payments. The period involved in the suit covers March 23, 1939 to December 31, 1944."

These employees have been voluntarily included by the respondent under the Act since January 1, 1945. Accordingly, the opinion of the Circuit Court shows upon its face that for the past 6½ years there has been no existing problem of enforcement of the Act. Since December 31, 1944, the sole question of law concerning coverage of these drivers under the Act has been rendered moot, except for petitioners' claim for money recovery for the period prior to January 1, 1945.

2. *The questions raised by petitioners have been virtually rendered moot since the amendment of Section 3 (j) of the Act in 1949—except for petitioner's claim for money recovery for the period prior to January 1, 1945.* The period involved in this section is from March 23, 1939 to December 31, 1944 (184).

Section 3 (j) of the Act was amended in 1949 so as to change the definition of the word "produced". As originally enacted, Section 3 (j) of the Act provided:

> "'Produced' means 'produced, manufactured, mined, handled or in any other manner worked on in any state and for the purposes of this chapter, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting *or in any other manner working on such goods or in any process or occupation necessary to the production thereof in any state.*'" (Emphasis supplied.)

In 1949 Section 3 (j) of the Act was amended so as to change its context and legal implications. It now reads as follows:

> "'Produced' means 'produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof in any state.*'" (Emphasis supplied.)

Far from being a question of important public consequence, the meaning of the old Section 3 (j) has now become virtually moot. While the opinion of this Court upon the old Act would be interesting, it would not provide any precedent for future litigants in the determination of questions which will arise hereafter under the amended Act. The issues involved in this case are confined to the scope of "produced" as it existed prior to the amendment of the Act in 1949. No further claims can now arise under the old act by reason of the expiration of the statute of limitations.

RESPONDENT'S OBJECTIONS TO PETITIONERS' STATEMENTS CONTAINED IN THEIR SPECIFICATIONS OF ERRORS

While respondent recognizes that petitioners may state their own "Specifications of Errors", nevertheless respondent objects to those assertions which misconceive the import of the Circuit Court's decision and do not correctly state the court's conclusions. In order to avoid any confusion, we wish to touch upon the first three specifications which we believe to contain unjustified assumptions as to the holding of the Circuit Court.

1 and 2. The first and second specifications of error—that the Circuit Court's opinion was based upon the concept that the bottles were not "goods" as contemplated by the Act, is incomplete. The reasons for the court's decision are set forth at pages 187 and 188. It was there concluded that the activity of the local drivers was not even remotely connected with production and, therefore, the local drivers were not engaged in the "production" of "goods". In so deciding, the Court noted, *in addition,* that the Vernor Company was not manufacturing bottles and therefore, bottles were not the sort of "goods" contemplated by the Act, so the drivers could be held to be producing them. On the other hand, the petitioners attempt to characterize the reasoning differently. They assert that the Court concluded that these bottles were not "goods" within the meaning of the Act and, therefore, despite the drivers' connection with them, they could not be within the Act. This entirely misconceives the gravamen of the Circuit Court's rulings.

3. This specification does not correctly state the basis of the Circuit Court's decision. It was not ruled, *ipso*

facto that because the handling of bottles preceded the production of ginger ale, the employees were thereby outside the operation of the Act. On the contrary, relying upon the record and the findings of fact in the district court, it was quite apparent that the connection between the activities of local drivers did not bring them within the Act. In the course of reaching this conclusion, the Court did comment upon the fact that the picking up of empty bottles preceded the production of ginger ale. However, this was not the basis of the opinion—which was the remoteness of the drivers' activities (187, 188).

RESPONDENT'S OBJECTIONS TO PETITIONERS' REASONS FOR GRANTING THE WRIT

1. *There is no conflict with applicable decisions of United States Supreme Court.* Petitioners claim that the Circuit Court "renders meaningless the final clause of Section 3 (j) of the Amendments of 1949". This could not be correct because the Circuit Court specifically confined its decision to Section 3 (j) of the old Fair Labor Standards Act of 1938, inasmuch as the period covered by the claim is limited from March 23, 1939 to December 31, 1944 (184, 186).

Petitioners claim that the Circuit Court "holds that petitioners are not covered by the Act because they did not participate in the physical process of making ginger ale." This is an absolutely incorrect summary of the Circuit Court's holding. The lower court completely recognized the principle that embraces maintenance employees who do not participate in the physical process of making the product, but the lower court also recognized the limitations of this doctrine (187, 188).

Petitioners cite six decisions of the Supreme Court with which they claim the instant decision is in conflict. All of these cases embrace employees who may be termed "maintenance" employees of one kind or another. There is no conflict with these holdings. The Supreme Court has clearly indicated that the Act is not confined to employees actually at the machine which fabricates the raw material into articles of commerce. For this reason, maintenance employees who contribute to production are considered within the Act. Consequently *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116 falls into the logical pattern of the rule. The mere fact that the employees of the owner of a loft building did the maintenance work did not change the character of their duties. The criterion of eligibility was held to be the function of the individual employee himself. Also *Martino v. Mich. Window Cleaning Co.*, 327 U. S. 173, 66 S. Ct. 379, held that window washers employed by an independent contractor but who served an industrial plant were eligible under the Act as maintenance employees. In *Borden Co. v. Borella*, 325 U. S. 679, 65 S. Ct. 1223, the same principle controlled even though the offices of the interstate producer were removed to a separate establishment physically disassociated from the production of milk in interstate commerce. In *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 63 S. Ct. 125, the same pattern was followed as to employees who actually participated in drilling an oil well which was completed by other employees who did the same work. There is of course no analogy between oil drillers and local city drivers returning empty bottles. In *D. A. Schulte Co. v. Gangi*, 328 U. S. 108, 66 S. Ct. 925, maintenance employees in a loft building were likewise embraced even though not employed by the manufacturer. *Roland Electric Co. v. Walling*, 326 U. S. 657, 66 S. Ct. 413, held that employees of an independent electric repair shop working upon electric motors and maintaining

the machines producing the company's product were likewise eligible. However, the petitioners were in no sense "maintenance" employees. There is no valid comparison between local city drivers who are a part of a city delivery system and the "maintenance" employees in the six cases cited by petitioners.

2. *The Circuit Court did not improperly "extend" the decision of this Court in Western Union v. Lenroot,* 323 U. S. 490, 65 S. Ct. 335. In *Western Union v. Lenroot, supra,* messenger boys who picked up and delivered telegrams for transmission and also delivered the completed message at the point of destination, were held to be outside the application of the Fair Labor Standards Act. That decision directly involved the question of whether handling or transporting, as such, standing alone, placed the employees within the provision of the Fair Labor Standards Act. Certainly the contact of these employees in picking up and delivering the message was as direct as that of the city drivers who delivered ginger ale and picked up empty bottles. The Supreme Court found that the telegrams were goods but that the handling involved in the *Western Union* case was not the kind contemplated in the Act. Mr. Justice Jackson stated:

> "If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended."

The Vernor employees, as a part of the city delivery system, handled empty bottles for transit purposes. The empty bottles were then stored in the stock pile at the company's plant. No clearer application of the *Western Union* case could be found.

3. *The Circuit Court did not erroneously interpret the statutory definition of "goods".*

Petitioners' reliance upon *Martino v. Michigan Window Cleaning Co., supra,* and *Roland Electric Co. v. Walling, supra,* to establish that the bottles were "goods" is difficult to understand. In both cases, the employees involved actually worked upon and wrought a change in the subject of their employer's business (windows were cleaned in the *Martino* case and motors were rewound and repaired in the *Roland* case). This was the subject of the employer's business. However, in the instant case the employees did not "produce" bottles. The empty bottles had long since been fabricated by the bottle manufacturers. These local drivers by their activities did not change their character, number, quality or content. The company itself was not a producer of bottles. Its business was the production and sale of ginger ale. The respondent could operate its plant continuously for weeks and there would not be one more empty bottle produced by reason of its activity. At best, the bottle ultimately became the container of its product, but this did not cause it to be "goods" or the subject of commerce by respondent.

4. *Petitioners have not pointed out any important questions to be settled by this Court.*

Petitioners base their claim under this topic upon "the Amendments of 1949 restricting the statutory definition of 'produced' in Section 3(j) of the Act." We are at a loss to know how petitioners can possibly be interested in the "Amendments of 1949", which occurred nearly 5 years after December 31, 1944—the end of the period claimed by petitioners in their suit.

Another strange circumstance is petitioners' anxiety to get a ruling under the "less limited definition" prior to

1949 in order to aid the future construction of Section 3 (j) of the Amendments of 1949. What interest do petitioners have in assuming the role of the Secretary of Labor in asserting an interest in future litigation under the Amendments of 1949 when the period covered in their suit is March 23, 1939 to December 31, 1944?

Petitioners' citation of *Kirschbaum v. Walling,* 316 U. S. 517, 62 S. Ct. 1116, is clearly inapplicable to the instant case. In the *Kirschbaum* case the employees were maintenance employees in a loft building. There is no similarity between such employees and city drivers who pick up empty bottles as a part of a local delivery system. Nor is there a valid analogy between the instant case and *Roland Electric Co. v. Walling,* 326 U. S. 657, 66 S. Ct. 413, where the employees of an independent electric repair shop actually worked upon the motors and maintained the machines producing the company's product.

5. *Allowance of interest from the date of rendition of the judgment was proper.* [Respondent does not concede that the question of interest is properly before this Court as a matter of independent jurisdiction—less than $200 being involved].

The granting of interest is controlled by *Title 28 U. S. C., Section 811,* which provides:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be leveled by the marshal, in any case where, by the law in the state in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. *Such interest shall be calculated from the date of the entry of the judgment at the rate allowed by state law.*" (Emphasis supplied.)

Under *Sec. 19.11 of Michigan Statutes Annotated,* the legal rate is five per cent. Interest was not allowed at common law and the granting of interest is purely a statutory matter. In *Keen v. Mid-Continental Petroleum Corporation* (1945), (D. C. No. Iowa), 63 F. Supp. 120, it was held that interest under this Act is not permitted until the entry of judgment.

The arguments advanced by petitioners misconceive the effect of the Portal-to-Portal Act. The Court has in its power the right under the Portal-to-Portal Act to grant or withhold liquidated damages, and nothing else can be read into that statute. Furthermore Congress had the benefit of *Brooklyn Savings Bank v. O'Neill* (1944), 324 U. S. 697, at the time it passed the Portal-to-Portal Act in 1947. Petitioners are now attempting to read language into a Congressional Act which is not there.

6. *There is no conflict with the decisions of the Fourth and Fifth Circuit Courts.* Petitioners argue that local delivery drivers, engaged purely in local delivery activities and confined solely within the area of metropolitan Detroit, are by an attenuated chain of reasoning, engaged in producing goods for commerce. These drivers in no respect fabricate bottles or in any way work on the ginger ale which is the product of the company. On the contrary, they are a part of a purely local delivery system whereby they deliver ginger ale to retailers and return empty bottles to the plant, which bottles are subsequently stored and at some future time are refilled with ginger ale. Petitioners strive to contend that these drivers are like the employees in *Enterprise Box Co. v. Fleming,* 125 F. 2d 827, and *Dize v. Maddrix,* 144 F. 2d 584.

There is no similarity between those two cases and the instant case. In *Enterprise Box Co. v. Fleming, supra,* and *Dize v. Maddrix, supra,* the employees involved were di-

rectly engaged in the production and fabrication of containers which were sold for the purpose of holding articles to be shipped in interstate commerce. They directly contributed to the fabrication of the container. The contrary is true of the Vernor city drivers. They merely handled, in the course of returning to the plant, empty bottles. Their activity in no way changed the form, character, number or content of the bottles, and had no effect upon them whatever. The distinction between the *Enterprise* and *Dize* cases is so clear that two courts have rejected the argument which counsel is now advancing for a third time in this Petition. There is no conflict between the Sixth Circuit Court of Appeals' decision and the *Enterprise* and *Dize* cases.

CONCLUSION

Petitioners have not presented any valid reasons for granting a writ of certiorari. In addition, it is evident that the issues raised *in this case* are virtually moot except for money recovery for the period prior to December 31, 1944.

Accordingly, respondent requests that the petition be denied.

Respectfully submitted,

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Detroit, Michigan.